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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

No. 226.

JOEL W. LOCKWOOD,

vs.

EXCHANGE BANK OF FORT VALLEY, F. T. RAPE, TRUSTEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF J. M. TERRELL, ALLEN FORT & SON, AND JOHN W. HAYGOOD, COUNSEL FOR PETITIONER.

[F-41]

26216

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Statement of the Case.

On the 23d day of November, 1900, the said Joel W. Lockwood was on his application duly adjudged a bankrupt by the district court of the United States for the southern district of Georgia. On December 6th, 1900, F. T. Rape was duly appointed trustee for said bankrupt; on the 16th day of December 1900, the said F. T. Rape, trustee, set aside and designated as an exemption all of the property returned by the said bankrupt in his schedule of assets. On the 1st day of January, 1901, the Exchange Bank of Fort Valley, a creditor who had

duly proven its debt as an unsecured claim, filed exceptions to the trustee's assignment of homestead and exemption upon the following grounds:

"(*a.*) That said creditor held a contract against the bankrupt in which said bankrupt specially waived and renounced all right to the homestead exemption allowed by the laws of Georgia or the United States. Said waiver is contained in a note constituting contract of indebtedness and was made in accordance with the provisions of the constitution and laws of said State authorizing and empowering the debtor to waive and renounce in writing his right to the benefit of the exemption provided for by the constitution and laws of said State.

(*b*) That creditor's debt was unsecured save and except so far as a waiver of homestead and exemption may be construed as a security.

(*c*) That the trustee has set apart all the property of said bankrupt returned by him in bankruptcy.

(*d*) Under the laws of Georgia, the debtor's exemption can not be subjected to the payment of a debt containing a waiver of homestead except by putting said debt in judgment, and afterwards causing execution to issue thereon to be levied on the exempt property in accordance with the provisions of section 2850, *et seq.*, of the Code of Georgia. If bankrupt court should approve trustee's assignment in this case without reserving to petitioner the right to sue his claim and put same in judgment, and without itself giving judgment for said debt, creditor would be left without means of enforcing his rights created and arising out of the aforesaid waiver and would be without remedy.

(*e*) Creditor therefore prays equitable relief and such decree as will protect his rights, that the homestead be set aside and trustee be required to take charge of and administer the property of said bankrupt so set apart, except so much as cannot be waived for the benefit of creditors holding waiver contracts."

To these exceptions of the creditor the bankrupt duly filed a demurrer on the following grounds:

"(*a*) That said exceptions are wholly insufficient in law to defeat the report of the trustee.

(*b*) That the exceptions made are not such as under the laws of Georgia will defeat the setting apart of the exemption, and furnish no reason why the trustee should not assign the exemption.

(*c*) That the bankrupt court has no jurisdiction over exempted property and no authority to administer the same.

(*d*) That there is no authority of law for the exemptions made, nor for the relief sought."

The referee, Hon. Shelby Myrick, overruled the aforesaid demurrer and directed the trustee to carve out of the said exemption of property a portion of the same amounting to $300,00 which was to be free from the claims of all creditors. The residue of the exempted property was to be sold and the proceeds held by the trustee for the benefit of creditors holding waiver notes. The bankrupt was ordered to yield possession to the trustee for the purpose of carrying out this order. The referee, at the request of bankrupt, certified the record in said case, together with his decision thereon, to the Honorable Emory Speer, judge of the district court of said district, for final determination. On the 30th of March, 1901, said case came on regularly to be tried before said district judge, and after hearing argument of counsel, his honor Judge Emory Speer, held and decided and adjudged that the aforesaid exceptions to the determinations and report of the trustee be sustained, and that the exmeptions set apart by the trustee in his said report be denied and refused to the said bankrupt, save and except the item of household furniture and wearing apparel, and that the said bankrupt was not entitled to an exemption as claimed by him by reason of having waived and renounced in writing his rights thereto in accordance with the constitution and laws of the State of Georgia.

This judgment and decision of the district court is the one complained of, and which is sought to be revised and corrected.

Petitioner then excepted to said decision and decree and now excepts to the same, and says that the same was error, and says that the court erred in not sustaining his demurrer to creditor's objection upon all the grounds therein stated, and in holding and deciding that the bankrupt court had jurisdiction over exempted property and authority to administer the same, and

in refusing and denying the bankrupt his homestead exemption.

A petition for the revision of the said proceedings in the district court of the southern district of Georgia having been allowed, the same came on for hearing in Circuit Court of Appeals and was argued, whereupon said court desiring the instruction of the honorable Supreme Court of the United States for the proper decision of the matters pending, certifies to said Supreme Court the following questions, to-wit:

1st. Under the bankruptcy act of 1898, does the title to the property of the bankrupt which is exempt from seizure and sale by execution under the laws of the State of the bankrupt's residence and domicile, and which property is claimed by the bankrupt as so exempt, vest in the trustee of the bankrupt's estate for purposes of administration and distribution in favor of lienholders or holders of waiver notes?

2d. Has the United States district court, sitting in bankruptcy in the State of Georgia, jurisdiction to administer the property of an adjudicated bankrupt which is exempt under the laws of the State, and which is claimed by the bankrupt, in favor of a creditor who proves his debt as an unsecured claim, and who holds and proves a note of the bankrupt in which the bankrupt specially waives all right to the homestead and exemption allowed by the laws of the State of Georgia?

BRIEF.

In answer to the first question, we insist that the title to the exempted property never vests in the Trustee of the Bankrupt for any purpose, and therefore cannot be administered and distributed by the Bankrupt Court.

Section 70a of the Bankrupt Act is as follows: "The Trustee of the estate of a Bankrupt * * * and his successor or successors * * * shall in their turn be vested by operation of law with the title of the Bankrupt as of the date he was adjudged a Bankrupt, *except in so far as it is the property which is exempt*," etc. In the case of Woodruff versus Cheeves, 105 Fed. Rep., p. 601, and sc. 5 Am. Bank. Rep., p. 302, the Fifth Cir-

cuit Court of Appeals says, commenting on the above section: "It seems clear to us that this language of the statute leaves no room for argument to show that the exempt property constitutes no part of the estate in bankruptcy subject to be administered by the Trustee, or by the Court of Bankruptcy." Mr. Justice Bradley, in case of Bass, 3rd Wood, p. 882, and Fed. Case No. 1091, uses the following language:

"In other words, it is made as clear as anything can be that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the Bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts in regard to which no such agreement has been made. But whether so or not, it is not for the Bankruptcy Court to inquire. The exemption is created by the State law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it, he may prosecute that claim in a court which has jurisdiction over the property, which the Bankruptcy Court has not.

"Nor does it make any difference that the homestead was not ascertained or set out in severalty until after proceedings in bankruptcy were commenced, or until after the conveyance to the assignee was executed. Whenever properly claimed and designated, the exemption protects it, and the exemption created by the Bankruptcy Act relates back to the conveyance and limits its operation. Though not designated, when the conveyance was executed, it was capable of being designated, and on the principle that *id certum est certum reddi potest*, it is as much entitled to the benefit of exemption, as if it had ben designated and set apart before the bankruptcy occurred.

"And here it is proper to remark that the assignee in this case misconceived his duty and powers when he assumed to judge that the Bankrupt was not entitled to a homestead. That is for the court to say and not for him. It was his business to report to the court whether the property claimed as homestead was or was not within the limit of value which the laws of Georgia allow for that purpose. Unless the court had this information, it cannot determine whether the property claimed is fairly within the allowance for homestead or not, and whether it had jurisdiction over the property or not.

"What equities might arise if there were several creditors, dand some of them had a lien or claim against the homestea

property, and others not, it is not necessary to decide. Those who have no such claim might, perhaps, properly object to those having such a claim being allowed to come in for a dividend against the general assets until they had first exhausted their remedy against the exempted property, on the principle of marshalling assets. This would depend on the question, whether the equity of the general creditors is superior to that of the Bankrupt and his family in reference to the right of homestead and exemption. In some cases at least the equities might be equal, perhaps, in which case the court would not require the assets to be marshalled. But even were the right to marshalling existed, the Bankruptcy Court could not assume jurisdiction of the exempted property and order it to be sold, but would require the favored creditor to pursue his remedy against such property in a forum that could lawfully reach it. The decree of the district judge is affirmed with costs.

"To the same effect see Rix Ass. *vs.* Bank, 2 Dill. 367; *in re* Poleman, 5 Biss. 526; Byrd Ass'n *vs.* Harrold, 18 N. B. R. 437; *in re* Stevens, 5 N. B. R. 298; *in re* Preston, 6 N. B. R. 545."

See also *in re* H. A. & B. T. Camp, 91st Fed. Rep. 745, where Judge Newman expressly decided the questions in this case. Also *in re* Wells, 5 Amer. B. R. 308.

The creditors rely upon the case of Solomon, Federal case 13156. It will be noted that this case was cited by me in the Bass case before Judge Bradley and that he did not regard it as controlling. In fact the question of jurisdiction was not made in that case, but the case was decided without reference to that point, so that it cannot be authority on the question at issue.

2. *The right of a Bankrupt to his homestead and exemption is not dependent on the will or grace of the Trustee. It is a legal right that he does not surrender by being adjudged a Bankrupt, and cannot be deprived of it by a Bankruptcy Court, because said court has no jurisdiction over said property, and this is true whether the same has been set apart by the Trustee or not, there being no issue as to whether or not the Bankrupt is such a debtor as is by the law of Georgia entitled to a homestead, nor as to*

any difference in value or kind from the amount allowed, nor as to any fraud in scheduling his property or creditors.

In fact the homestead set apart was valued at $745.00 when the law allows $1,600.00. The sole objection made was that the Bankrupt had waived his right of homestead and exemption in a note, whose principal and interest amounted to less than $300.00. Upon this objection by an unsecured creditor his entire homestead except $45.00 is denied him and is to be seized and sold by the Trustee and administered by him. A statement of these facts is the best argument to show that the Court erroneously assumed jurisdiction. What is to become of the excess after paying claim of the Exchange Bank ? Shall creditors who hold no waivers be paid this amount, because in one instance the Bankrupt waived his homestead ? Certainly not.

3. *The District Courts and Courts of Bankruptcy are courts of limited, but not of inferior jurisdiction. There are no presumptions in favor of their jurisdiction and it must affirmatively appear. The Bankruptcy Court is purely statutory and has no power or jurisdiction except what is expressly or by necessary implication conferred by the Bankrupt Act.*

As to exempted property, the law and the decisions of the courts clearly demonstrate that said courts have no jurisdiction no matter in what manner it is sought to be invoked or exercised. But the Court of Bankruptcy can "determine all claims of bankrupts to their exemptions." What does this grant of power mean ? In connection with sections 6 and 70a and the general orders of the Supreme Court it is clear that the Bankruptcy Court is limited to the State law of force in relation to homestead, and may properly enquire and determine upon proper exceptions filed:

First. "Whether or not the Bankrupt comes within any one of the designated class of debtors entitled under the Constitution and Laws of the State to an exemption; second, whether the exemption allowed by the Trustee as claimed by the Bankrupt is greater or less in amount or value or different in kind than that allowed by the laws of the State; third, whether or not the laws of the State have been followed by the Bankrupt

in scheduling property, or by the Trustee in setting apart and allotting the homestead."

Should any other questions than these be raised we maintain that the Bankrupt Court has no power or jurisdiction to determine them.

It must be guided by the State Laws as to exemptions, for by the terms of the Act (Section 6a) the allowance to bankrupts of their exemption under the State Law is not to be "*affected*" by the bankruptcy. As to exemptions the Act of Congress adopts the State Laws of the bankrupt's domicile and his right to an exemption must depend on those laws, and must be determined by them. See *in re* Duerson, Fed. Cas. No. 4117. *In re* Feely Fed. Cas. No. 4714. *In re* Wyllie Fed. Cas. No. 18112.

4. *The Trustee and the Court of Bankruptcy as to exemptions in Georgia, exercises the same power and are goverened by the same law that the Judge of the Court of Ordinary in Georgia exercises in setting apart a homestead and exemption, and the Court of Bankruptcy can allow no exemptions to the Trustee's report, that would not be sustained before the Ordinary were the exemption sought under the Georgia laws independent of the bankruptcy. The exemption in bankruptcy has been held to be equivalent to the exemption by the Ordinary.* See 65 Ga. 624, 71 Ga. 71, 80 Ga. 336.

In the Civil Code of Georgia, Section 2828, *et seq.*, providing the mode and procedure for having an exemption set aside, no reference is made to "waivers." Section 2886, which defines such objections as may be urged, is as follows: "Objections, how and when made. Should any creditor of the applicant (for homestead) desire to object to said schedule, for want of sufficiency and fullness, or for fraud of any kind, or to dispute the valuation of said personalty, or the propriety of the survey, or the valuation of the premises so plotted as the homestead, he shall, at said time and place of meeting, specify the same in writing." This shows clearly that no such objection as the waiver can be urged as a valid reason for denying the exemption. In 74 Ga. Rep. 545 (see also 43 Ga. 418) there are

certain expressions made by Judge Blanford, who delivered the opinion, that would seem to indicate contrariwise, but a careful examination of that case will show that these expressions were *obiter dicta*, and are not binding. In the case in 74 Ga. the question was as to the right of a purchaser to be heard to make any objection to the assignment of a homestead. The opinion is short and does not contain a full statement of facts, but enough is stated to show that a creditor had obtained judgment on a note which contained a waiver of exemption, and had levied on the land sought to be "homesteaded." Pending this levy, or before the land was sold under the *fi fa* and the purchaser claimed title. As in all judicial sales, the purchaser was subrogated to the rights of the creditor. Whether the homestead had been set apart, or was attempted to be set apart, the creditor had a right to sell and the purchaser acquired a valid title because the homestead property was subject to the judgment and *fi fa* and he took by his purchase all his creditor's rights. The question of urging the waiver as an objection was not necessary to be decided—was not the question at issue. As was well said by the Supreme Court of the United States in 16 Howard p. 287, "This court has never held itself bound by any part of an opinion, which was not needful to the ascertainment of the question between the parties." This is a familiar and well settled principle. There are no other cases sustaining this *obiter dictum* of Judge Blanford, and certainly there is no law of Georgia that authorizes his statement. If it be not *obiter* it is "bench law," which lacks the force of a statute and cannot repeal the sections of the Code above quoted. Judge Speer in his learned and elaborate opinion in the Woodruff case attached no importance to this decision, not even alluding to it, while in the present case he simply quotes the *obiter dictum* without explanation or comment. It is remarkable that its importance as authority became manifest only when this court had decided adversely to him in the Woodruff case.

While it is true the debtor can waive his homestead, except as to wearing apparel and $300.00 worth of household and kitchen furniture and provisions; and while a debtor may take a homestead on property for which the purchase money is unpaid, still the homestead can be subjected by sueing the claim

to judgment and levying on and selling said property, notwithstanding the homestead. Section 2850 of the Civil Code; yet there is no provision in the laws of Georgia for the Ordinary to deny a homestead on these grounds or to administer the homestead property for the purpose of protecting these claims. Section 2850 of the Code is as follows: "In all cases when any defendant in execution has applied for, and had set apart a homestead of realty and personalty, or either, or where the same has been applied for and set apart out of his property, as provided for by the Constitution and Laws of this State, and the plaintiff in execution is seeking to proceed with the same, and there is no property except the homestead on which to levy, upon the ground that his debt falls within some one of the classes for which the homestead is bound under the Constitution, it shall and may be lawful for such plaintiff, his agent or attorney, to make affidavit before any officer authorized to administer oaths, that, to the best of his knowledge and belief, the debt upon which such execution is founded is one from which the homestead is not exempt, and it shall be the duty of the officer in whose hands the execution and affidavit are placed to proceed at once to levy and sell, as though the property had never been set apart. The defendant in such execution may, if he desires to do so, deny the truth of the plaintiff's affidavit by filing with the levying officer a counter affidavit." There being no law authorizing the denial of the exemption on account of the waiver, and this not being a valid objection to the Trustee's report, the court below erred in holding the contrary, and in rendering the judgment complained of.

We have shown that the Bankrupt was entitled to his exemption in this case, so far as his right to have a homestead is concerned, and so far as the kind of property and its valuation were concerned, and that the "waiver" was not a valid objection; so there is nothing in this case to change the law, which denies to the Courts of Bankruptcy jurisdiction over homestead property, and authority to administer such property. It is substantially the same question made in the Woodruff case and is ruled by that case. The right of the Bankrupt to his exemption was complete. He never surrendered this right by going into bankruptcy, and he holds the exempted property adversely

to the Trustee, and the Court of Bankruptcy cannot deprive him of it without his consent.

6. It is said that unless the Court of Bankruptcy assumes jurisdiction in some way, either in disposing of the Trustee's report on the homestead or by "plenary proceedings in equity," that the creditor will be remediless, and that where there is a right there is a remedy. While this is true as a general proposition, it does not apply to cases in bankruptcy. It is the *right* of every creditor to collect his just debt and to have a judgment for the same, yet the Bankrupt Act allows the debtor to be fully discharged from such debts, and stays any suit to collect the same. Does the waiver of homestead make the debt more sacred? Does it make it non-provable in bankruptcy? No. It is simply an unsecured debt, with an inchoate right to sell the homestead under conditions prescribed by law. If bankruptcy intervenes and prevents him from using his remedy he must suffer the fate of other unsecured creditors. His misfortune cannot give the Court of Bankruptcy jurisdiction. Congress alone can do that, and this it has not done. It is in vain to argue on the wisdom and necessity of giving the Bankruptcy Courts this jurisdiction—that argument might have been addressed to Congress—but the Courts construe the law, they cannot rightfully make it.

It may be that the State Court can on a proper proceeding give relief to the creditor, holding a waiver of homestead in a proceeding *in rem*. We are not called on to furnish a remedy. What we are now to discuss is, *whether or not the Court of Bankruptcy has power and jurisdiction to administer exempted property, and we think it clear that it has not.* The State Courts can in due time determine their powers and jurisdiction.

It will be noticed that under the general rule of this Court form No. 1 of the debtor's petition, it is prescribed that the debtor surrenders for the benefit of his creditors all of his property *except such as is exempt by law*. A very able opinion by Judge Jones, of the Middle district of Alabama, discusses the question at bar fully and sustains the conclusion that the Bankrupt Court has no jurisdiction of exempt property and that the naked waiver does not defeat the homestead. See *in re* Moore, 7th Amer. Bank. Rep. 285. The court in the opinion uses the following language: "If the Court of Bankruptcy

allowed the naked waiver to prevail over the right of exemption, it would accord the naked waiver the legal effect always denied to it in the State Courts. This would be administering a law of the Court's own making and not the enforcement of the law of the State, which the Bankrupt law makes the law of this Court in the matter of exemption." And the Court, in the same opinion, says further: "The law of the land is that the waiver cannot be enforced against him save after judgment and execution in the mode provided by statute. When he claims exemption against a mere naked waiver he neither denies the waiver nor seeks to escape from the legal consequence which the law attached to the waiver when made. He is merely demanding that the naked waiver shall not have effect beyond the limits which the law assigns it as long as it remains a mere waiver. When he claims exemption, and to that extent opposes the waiver, his defense against it is not that he did not make the waiver, nor that the waiver, if it had ripened into judgment in the statutory mode, ought not to prevail over the exemption. His position, admitting all this the making of the waiver, is that his right of exemption can be defeated only by a judgment and execution conforming in all respects to the statute and in existence at the time the exemption is claimed. The allowance of his contention that a mere waiver not reduced to judgment cannot prevail over the right of exemption will not defeat any just expectation raised by the taking of the note with the waiver, since the law of the land of its own force, incorporated as a term of the contract made by the waiver that the right of exemption should not be defeated by such waiver unless it was enforced by judgment and execution conforming to the statute. The Bankrupt has never agreed by the making of the waiver that it should be enforced against him or his property save by due process of law, which in this instance requires that there be judgment and execution before the waiver can be fastened upon the property. The law charges the creditor with notice and, as we have seen, made it a term of the contract that the waiver alone would not suffice to defeat the right of exemption, and in so insisting, the debtor is not violating any term of the contract." And further quoting from said opinion, the Court said: "The adjudication in bankruptcy ought not to place the bankrupt in any worse condition regarding his ex-

emption than other residents of the State who have not been adjudicated bankrupt. The exemptions of a person who has not been adjudicated bankrupt could in no event be defeated by a mere waiver. If a Court of Bankruptcy, by reason of its jurisdiction over the person of the bankrupt and its power over his exempt property (if it had any other jurisdiction over it than to set it aside) can defeat the bankrupt exemption under circumstances which would not destroy the right of exemption in any other resident of the State, the bankrupt by the adjudication would be in a far worse plight regarding his exemption than any other resident of the State. This would defeat one of the manifest purposes of the Bankrupt Act, which is to secure to the bankrupt the same exemption as is allowed to the other residents of the State and on the same terms."

Another cose, the Powers Dry Goods Co. versus Nelson, before the Supreme Court of North Dakota, reported in 7th Amer. Bank. Rep., p. 507, Young delivering the opinion, said: "The jurisdiction of the Bankruptcy Court is limited to determine whether or not the property is exempt and the title thereto remains in the bankrupt, and when set apart as exempt by the Bankruptcy Court is subject to the jurisdiction of the State and not the Federal Court."

In conclusion, we insist that the question of jurisdiction is purely statutory, and Congress has not seen fit to confer this on the Bankruptcy Court, and the Court cannot do so.

J. M. Terrell.

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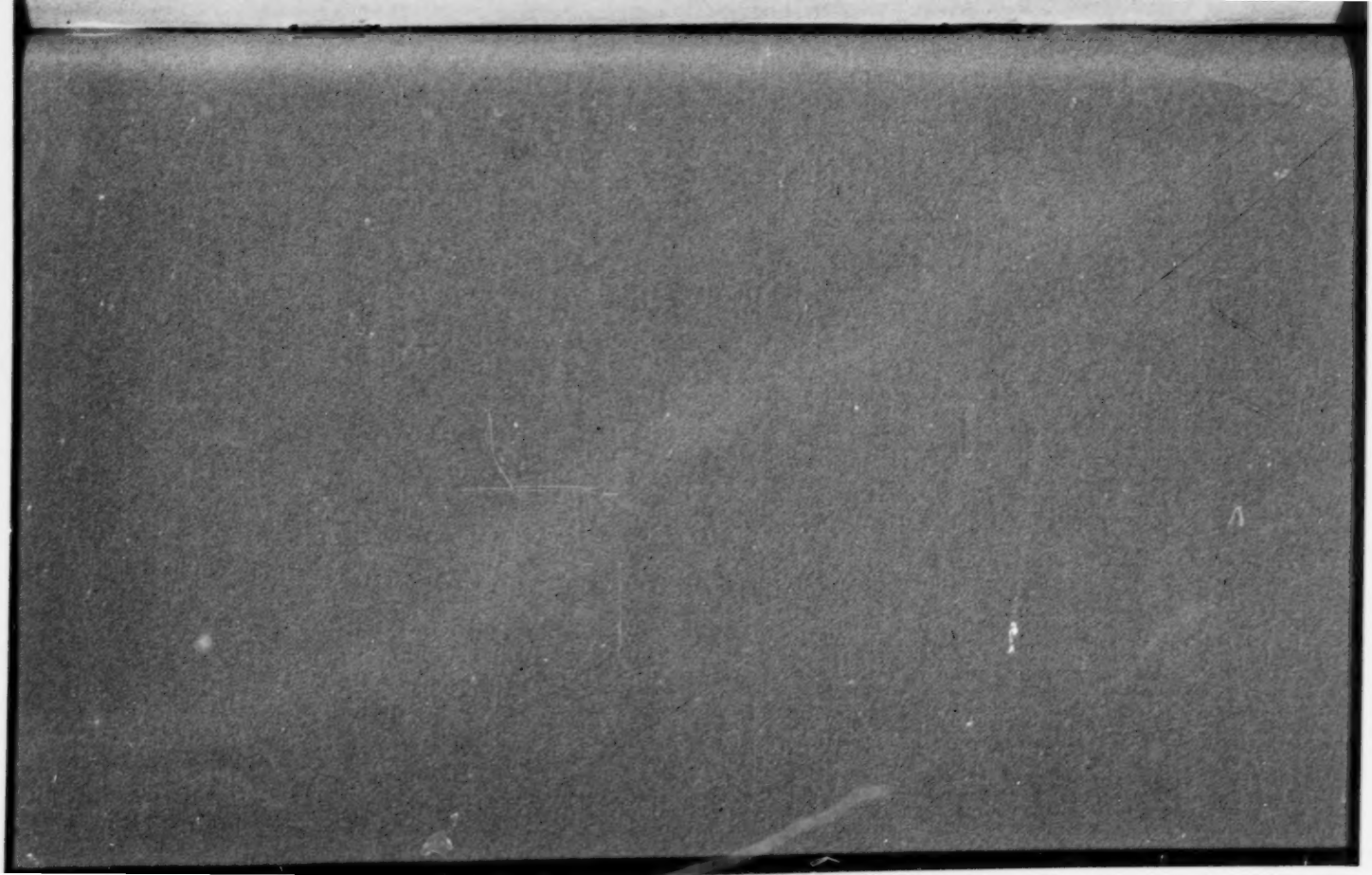
OLIN J. WIMBERLY,
(WITH WHOM JOHN S. HALL ON THE BRIEF),
FOR
EXCHANGE BANK OF FORT VALLEY, AND F. T. RAPE, TRUSTEE.



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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

I.

The history of this case is correctly set out in the statement of the case by counsel for Lockwood in their brief.

II.

The two questions certified by the Circuit Court of Appeals are as follows:

1st. Under the bankruptcy act of 1898, does the title to the property of the bankrupt which is exempt from seizure and sale by execution under the laws of the State of the bankrupt's residence and domicile, and which property is claimed by the bankrupt as so exempt, vest in the trustee of the bankrupt's estate for purposes of administration and distribution in favor of lienholders or holders of waiver notes?

2d. Has the United States District Court, sitting in bankruptcy in the State of Georgia, jurisdiction to administer the property of an adjudicated bankrupt which is exempt under the laws of the State and which is claimed by the bankrupt, in favor of a creditor who proves his debt as an unsecured claim, and who holds and proves a note of the bankrupt in which the bankrupt specially waives all right

to the homestead and exemption allowed by the laws of the State of Georgia?

We insist that the two questions do not properly present the issues which were made in this case for decision by the Circuit Court of Appeals. In the first question certified to this Court, this Court is asked to decide whether title to property of the bankrupt, "which is exempt from seizure and sale by execution under the laws of the State of the bankrupt's residence, * * * * vests in the trustee," when the real question before that Court was whether, under the laws of Georgia, a debtor could select property as exempt, and whether the title to property thus selected did not pass to the trustee. In other words, our contention was, and is, that a debtor cannot, under the laws of Georgia, select property and by such selection give it the character of exempt property, that there must be a judgment of the proper Court finding that the debtor is entitled to an exemption, and setting apart property to him as his exemption, and until this is done there is no property of the debtor in Georgia, "which is exempt from seizure and sale by execution under the laws of Georgia," save a few articles of property which will be hereinafter referred to.

The second question certified asks if the bankruptcy court has jurisdiction to "administer the property of an adjudicated bankrupt which is exempt under the laws of the State." This question likewise fails to present the real issue made by the record in this case, and which was presented to the Circuit Court of Appeals for decision, as hereinabove pointed out in our comment on the first question propounded.

III.

If property is "exempt to the bankrupt," then title does not vest in the trustee, but it is our purpose to make clear that, under the laws of Georgia, there is no exemption to the debtor until there is a judgment of the proper court setting apart an exemption, and under the bankrupt law, which is, in respect to exemptions, to be administered according to the laws of the State of the bankrupt's domicile, there is no exemption of property to the bankrupt in Georgia until the same is allowed by the court of bankruptcy. In other words, under the laws of Georgia a debtor cannot claim any property as exempt until it is set apart to him on proceedings instituted for that

purpose, except a few articles of property, as hereinabove stated. Title to the property of the bankrupt vests in the trustee *sub modo*, subject to such exemption as shall finally be awarded and defined.

See 108 Fed. Rep., p. 599, decision by the Circuit Court of Appeals for the Seventh Circuit.

This is so in reference to the property of bankrupts in the State of Georgia, unless the law of the State of Georgia in reference to exemption is wholly disregarded.

IV.

Lockwood claims exemption under the Constitution of Georgia of 1877, and the Acts of the Legislature passed in pursuance thereof. In order that the Court may fully understand the law of Georgia relating to exemptions to debtors, we set out herein the provisions of the Constitution which provide for an exemption, and require the Legislature to provide by law for setting apart an exemption, and also the provision of the Constitution which provides that a debtor may waive or renounce his right to an exemption.

The constitutional provision which gives the right of homestead and exemption is contained in Article 9, Section 1, and Paragraph 1 of the Constitution of 1877, which abrogated the exemption of 1868, embraced in Section 5912 of the Code of 1895, and is as follows:

"There shall be exempt from levy and sale, by virtue of any process whatever under the laws of this State, except as hereinafter excepted, of the property of every head of a family, or guardian or trustee of a family of minor children, or every aged or infirm person, or persons having the care and support of dependent females of any age, who is not the head of a family, realty or personalty, or both, to the value in the aggregate of sixteen hundred dollars."

Article 9, Section 4, Paragraph 1 of the Constitution of 1877, Section 5915 of the Code of 1895.

"The General Assembly shall provide by law, as early as practicable, for the setting apart and valuation of said property. But nothing in this Article shall be construed to effect or repeal the existing laws for exemption of property from sale contained in the present Code of this State in Paragraphs 2040 and 2049 inclusive, and the acts amendatory thereto. It may be optional with the applicant to take either, but not both, of such exemptions."

The Legislature, pursuant to this requirement of the Constitutio provided how the homestead and exemption might be set apa Section 2828 of the Code of 1895 requires the person asking t benefit of the homestead and exemption to apply by petition to t Ordinary of the county of his residence, in which he shall state (of whom his family consists, their ages, &c., and shall state out what property the exemption is claimed ; (2) the applicant is requir to accompany his petition with a schedule containing a minute a accurate description of all his real and personal property, and also wi list of his or her creditors, and their post-offices, if known, and t petition is required to be sworn to by the applicant ; (3) for failu to comply with the foregoing requirements prior to the final procee ings before the Ordinary, the Ordinary is required to dismiss t petition ; (4) the applicant is required to apply to the Ordinary f an order to the County Surveyor to survey off his homestead, allow by the Constitution, and make a plat of the same, which order t Ordinary shall grant.

Section 2830 of the Code of 1895 provides that if there are a fraudulent omissions of property from the schedule, which shall n be promptly delivered up when discovered, it shall defeat the right the applicant to homestead

Section 2831, Code of 1895, provides that the Ordinary shall gi notice in the public gazette in which the orders from the Ordinary office are usually published of the application for homestead and e emption, and the date on which the same will be passed upon by t Ordinary in his office.

Section 2833 of the Code of 1895 provides that the hearing sha not take place less than twenty days nor more than thirty days fro the date of the order of the Ordinary.

Section 2832 of the Code of 1895 provides, in addition to the pu lic notice required to be given by the Ordinary, that the applica shall give notice in writing of the filing of such application and t date of hearing the same to each of his creditors. And the Supren Court of Georgia held that a homestead set apart by the Ordina where the debtor failed to give the notice hereinabove required, w void as to such creditor, but the debtor could reapply for exemptio as against such creditor.

68th Ga., 365.

This is stated for the purpose of showing that the judgment, *i.*

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the approval of the Ordinary, of the setting apart of a homestead exemption, is necessary before the head of the family can have the exemption, and it is treated like a judgment that is void for want of service, which disproves the idea that there is any such thing as a vested right to a homestead under the Constitution and laws of Georgia. The statute further provides that the surveyor shall survey the land of the applicant and value the same, and return a plat of the land with the valuation to the Ordinary, which return must be made under oath.

The Constitution of 1877 authorizes the setting apart of the homestead and exemption to the amount of sixteen hundred dollars, which the debtor may have, all in lands, all in personal property, or both, to the amount of sixteen hundred dollars. If a debtor asks for an exemption of realty and of personalty, and his property exceeds in value sixteen hundred dollars, the Ordinary is required to appoint a receiver to take charge of the excess of real estate and the excess of personal property, over and above the total allowance of sixteen hundred dollars and sell the same for the benefit of the creditors of the debtor.

See Sections 2855 und 2856 of the Code of 1895,

Section 2836 of the Code of 1895 provides for objections which creditors may make before the Ordinary, and is as follows:

"Objections how and when made. Should any creditor of the applicant desire to object to said schedule for want of sufficiency and fullness, or for fraud of any kind, or to dispute the valuation of said personalty, or the propriety of the survey, or the value of the premises so platted as the homestead, he shall, at said time and place of meeting, specify the same in writing."

Section 2838 of the Code of 1895 provides how the objections made may be disposed of by the Ordinary.

If any objections be filed, or, after filing, they should be disallowed, or the return of the surveyor is made to conform to objections, if any are made, the Ordinary is required to approve the plat of the real estate and the schedule of personal property, which approval becomes the judgment of the Ordinary.

We have set out at considerable length the proceedings which are required by the Constitution and laws of Georgia to be followed by one claiming a homestead and exemption, for the purpose of showing that there is no vested right in an applicant for homestead—that the

right is inchoate—purely so—and that there are provisions of law which, if violated, will defeat this right.

There must be a regular proceeding before the Ordinary, all the creditors of the applicant for exemption must be notified, and the Ordinary may, or may not, allow the exemption after hearing evidence touching the application and such evidence as may be submitted by objecting creditors, if there be such. A debtor is not permitted to select an exemption, save and except a few articles of property which will be hereinafter referred to, but the Ordinary determines what the exemption shall be, if any, and he administers the remainder of the estats of the debtor, if there be any, through a receiver appointed by him for that purpose.

V.

The objections provided for in Section 2836 of the Code of Georgia, *supra*, which is a part of the Act of 1868, not repealed nor modified by the Constitution of 1877, nor by the Acts of Legislature of 1878, must be made before the Ordinary, and, if not made, his judgment is final as to all such matters. See

Bartlett *vs.* Russell, 41 Ga., p. 196.

But such judgment is not conclusive as to any objection which contests the right of exemption, or the right of exemption as against any particular debt, unless such objection is also made and passed upon by the Ordinary. See

Harris & Colquitt *vs.* Baggs, 44 Ga., p. 663.

Before the homestead is set apart, the statute provides for certain exceptions which may be made by a creditor, contained in Section 2836 of the Code of 1895, *supra*. These objections the Ordinary is bound by the statute to hear and determine. In addition to the grounds and objections which the Ordinary is compelled to hear, under the statute, he may also hear any other objections which may be urged against the setting apart of the homestead and the judgment rendered by him on such objections, though not specifically designated and provided for in Section 2836 of the Code of 1895, *supra*, is binding upon both parties unless reversed on appeal, and an appeal is provided for from the decision of the ordinary in homestead cases. Such is the decision of the Supreme Court of Georgia, in the 47th Ga., p. 452. In that case the creditor urged, as a reason why the homestead should not be set apart on the application of his debtor, that the claim which

he held against his debtor was for the purchase money of a portion of the property included in the application for homestead, and the Ordinary decided adversely to the creditor. Subsequently the creditor undertook to treat the judgment of the Court of Ordinary as a mere nullity, on the ground that the objection he urged against the setting apart of the homestead was not one of those objections which a creditor could make before the Ordinary that are specially enumerated in the statute. On this point the Court said:

"The creditor is not obliged to go before the Ordinary and contest the right of the debtor to a homestead on any other grounds than those stated in Section 6 of the Act of 1868, as that section is amended by the Act of 1870 (now Section 2836 of the Code of 1895, *supra*), but if he voluntarily appear and submit issues to the Ordinary, which, if but for such submissions that officer would have no power to pass upon on an application for homestead, and of which the Ordinary takes jurisdiction, such creditor will be bound by the judgment."

Here we have a decision by the Supreme Court of Georgia, that a creditor holding a claim for purchase money against the property which is sought to be set apart as a homestead, may go into court voluntarily and object to the setting apart of the homestead on that ground, although he is not compelled to do so under the State law. He might wait until he obtained judgment and then levy on and sell the homestead, as is provided in Section 2850 of the Code of 1895, *supra*.

We will show by numerous decisions of the Supreme Court of Georgia that a homestead waiver is in the nature of a conveyance and as effectually passes the property of the debtor to the creditor, to the extent of the creditor's claim, as if the debtor had passed the property by regular conveyances.

The Supreme Court of Georgia, in the 107th Ga., 812, decided that a creditor could not enjoin the Ordinary from setting apart to the debtor his homestead out of lands which the creditor alleged the debtor had conveyed. In passing upon this question of the denial of the right of the creditor to enjoin the Ordinary, the Court said: "The presumption is that the Ordinary in passing on the application will do so according to law, and, in the exercise of the judicial power vested in him, would refuse to approve the application because of the want of right in the applicant to have the property set apart as a homestead to his family, to which he has no title."

(See end of case, p. 817.)

Here is a clear, distinct and unequivocal statement, that when an application is made for homestead, a creditor can resist the application on any ground which would defeat the homestead right, although such objection is not enumerated in Section 2836 of the Code of 1895, *supra.*

Recently the question as to the character of the judgment rendered by the Ordinary in exemption cases came before the Supreme Court of Georgia, and the decision is reported in the 101st Ga., commencing on page 474. In that case the record did not disclose that the Ordinary had issued the order to the County Surveyor to survey and make plat of the homestead exemption, which is absolutely essential to the validity of such exemption. An effort was made after the judgment of the Ordinary setting apart the homestead to attack the judgment collaterally, because the record failed to show such order. The Court held that such attack could not be made for two reasons: First, that the judgment of the Ordinary was to be treated as any other judgment of a Court of general jurisdiction, and could not, therefore, be attacked collaterally; and, second, it being the judgment of a Court of general jurisdiction, all presumptions are in favor of the validity of the judgment, and the absence of a reference in the record to the passage of the order by the Ordinary to the Surveyor would not in the face of such presumption be received as evidence that in point of fact no such order had ever been issued. After drawing the distinction between judgments by Courts of limited jurisdiction and judgments by Courts of general jurisdiction, the Court said: "Now, in the matter of homesteads, their allowance or disallowance, the Ordinary has original and exclusive jurisdiction; an appeal from his decision is allowed. In the light of the clear distinction drawn above, which is supported in 2d Howard, 319–341, we are bound as a matter of law to give to his judgments in these matters not only the force and effect to which the judgments of other Courts of original jurisdiction are entitled, but the same incidents and presumptions."

Thus it will be seen that the judgment of the ordinary setting apart a homestead stands upon the footing of any other judgment of a court of general jurisdiction, and that the exemption is obtained by the applicant, not by the exercise of his will and choice, but through and under the judgment of a court. These authorities must convince the Court that a debtor in Georgia cannot select his exemption, point it out and have it set apart when he may choose to do so, and that he

is entitled to no exemption, aside from the wearing apparel of himself and family and household and kitchen furniture and provisions to the value of three hundred dollars ($300.00), unless he goes through a judicial proceeding, sets up and establishes his right to the exemption. Hence the bankrupt act of 1898, wherein it provides that exempted property does not pass to the trustee, means specific articles of property which are exempted absolutely under the laws of the State of the bankrupt's domicile, and such other property as the court, *i. e.*, bankrupt court, under the act of 1898 may determine the bankrupt is entitled to under the laws of his domicile. It seems to us clear that the question of the right of the bankrupt to an exemption must be tried and determined by the bankrupt court, where objections are filed, and no action on the part of the trustee in setting apart what the bankrupt may claim as an exemption can pass the title to the bankrupt, or deprive the trustee of the custody and title to such property until there is a decision by the court as to the extent of the bankrupt's right to exemption. Therefore the Court, in administering this clause of the bankrupt act, must decide whether or not the debtor is entitled to an exemption against the claim of his creditors under the laws of the State in which he is domiciled before it can be said that the title to any portion of the debtor's property does not pass to the trustee, and, if the Court decides that the debtor is entitled to an exemption, then, to the extent of the property awarded the debtor as an exemption, the title does not pass to the trustee.

We cannot better express our views upon this particular point than they are stated in the language of Chief Justice Waite, *in re* Solomon, Federal Case No. 13,166, as follows:

"The privilege, so far as it is given by the Constitution, is personal to the householder. The language is, 'to be selected by him.' If he neglects to act, no one is authorized by the Constitution to act in his place. The case is entirely different from what it would have been if it had been declared that certain specific property should not be sold under execution, etc. In that case the Constitution, or a law containing similar provisions, would execute itself, and, as it would be a part of the public policy of the government to exempt that particular property absolutely from forced sale, its provisions could not be waived. It would be beyond the legal power of an officer to levy upon and sell such property."

Under the Virginia Constitution, the privilege was given to the

debtor to select the property which he wished to be exempted. Under the Constitution and laws of Georgia, hereinabove referred to, the debtor is not permitted to select the property which may be exempted. He is required to make a schedule of all of his property; the county surveyor surveys and values his real estate, which valuation may be disputed by creditors, and the valuation placed upon personal property by the applicant may be disputed by creditors, and the Ordinary, passing upon the application, may determine what property, if any, will be set apart as a homestead exemption. In this respect the case at bar is a stronger one than that presented by the creditors of Solomon, *in re* Solomon, *supra*, as showing that in no sense can the homestead and exemption right in Georgia be called a vested right in the debtor.

Further, on the question that any objection to the setting apart of an exemption may be made, heard and determined when the application for exemption is submitted, although such grounds of objection are not provided for in Section 2836 of the Code, *supra*, we cite the following cases:

The Supreme Court of Georgia has recently held that the objections to an exemption, which Section 2836 of the Revised Code of 1895 provides for, are as set out above in this brief, and that when any other objection is made than those enumerated in Section 2836 of the Code of 1895, *supra*, an adverse decision thereon can be overcome only by a writ of *certiorari*, and is not the subject of appeal. (See 109 Georgia, page 618, second paragraph on said page.) The Supreme Court of this State has repeatedly held that any question which a creditor may urge in opposition to an exemption, may be made before a Court of Ordinary, if the creditor chooses to do so, and the Ordinary may, and shall, decide all the questions made, the distinction being as hereinabove stated, *i. e.*, that the objections specified in Section 2836 of the Code of 1895, *supra*, *shall* be made before the Ordinary and not thereafter, and all other objections *may* be made before the Ordinary, or can be made after the exemption is set apart as the creditor may choose. (See also 59 Georgia, 399, and 44 Georgia, 663.) We also cite 107 Georgia, page 112. This decision holds that the Ordinary should, in the exercise of judicial power, refuse to allow an exemption of the property to which the applicant did not have title. Under the uniform ruling of the Supreme Court of Georgia, the person holding title to property which has been set apart to

another as an exemption may assert his title after the exemption is set apart, but the Supreme Court held in the case cited that where the objection is made before the Ordinary that the Ordinary should refuse to allow an exemption.

An objection that the applicant for homestead is not one of the persons entitled to homestead is not provided for in Section 2836 of the Code of 1895, *supra*, but such objections may be made by any creditor when the application for exemption is made before the Ordinary. (See 40 Georgia, page 173.) In that case, the application was made for exemption and the creditor objected to the setting apart of an exemption on the ground that the applicant was not the head of the family. The Ordinary disregarded this objection and the case was carried to the Superior Court. In the Superior Court the same objection was urged and the Superior Court likewise overruled it, and the Supreme Court reversed the court below, stating that this objection should have been sustained.

In the 41 Georgia, page 622, is a case where the creditor objected to the setting apart of an exemption by the Ordinary upon the ground that he had a distress for rent levied upon certain property included in the application for exemption, and that his lien for rent was superior to the homestead right. The Ordinary sustained the objection and disallowed the same as against this debt. The Superior Court, on appeal, reversed the judgment of the Ordinary, but the Supreme Court of the State reversed the Superior Court, and sustained the Ordinary. In 109 Georgia, page 616, the application was made for exemption by a debtor, and her creditors demurred to the petition upon the ground that the petitioner was not entitled to an exemption, which demurrer the Ordinary sustained and the applicant for exemption appealed the case to the Superior Court. The appeal was there dismissed because the objection was not of the class enumerated in Section 2836, from which an appeal could be had from the Ordinary to the Superior Court. The judgment rendered by the Superior Court was affirmed by the Supreme Court. In this case the right of a creditor to object to the setting apart of an exemption by the Ordinary on grounds other than those cited in Section 2836 of the Code of 1895, *supra*, is distinctly recognized and affirmed.

But the exact question with which we are now dealing, to wit: The right of the creditor to object to the setting apart of the homestead on the ground that his debtor had waived the right to homestead as

against his debt, was passed upon by the Supreme Court of Georgia, in the 74th Ga., p. 545. This case arose on the following state of facts: Tappan Bros. & Co. bought the property of one Hunt at Sheriff's sale. Hunt then applied for a homestead and exemption in the land so sold. The purchasers went before the Ordinary and objected to the setting apart of the homestead, on the ground that they were the purchasers of the land under judgments which were founded on contracts of Hunt, wherein he had waived all right of exemption or homestead, and that they, as purchasers, were subrogated to the rights of the plaintiffs in *fi. fa.* This objection was demurred to by the applicant, upon the ground that it did not embrace any of the objections allowed by law, *i. e.*, such as are specially enumerated in Section 2836 of the Code of 1895, *supra*. The Court below sustained the demurrer, and disallowed the objections. The Supreme Court in passing upon this question, after deciding that these purchasers occupied the position of the creditor of the applicant, under whose judgment the land was sold, and that they might urge any objection to the grant of the application which the creditor might have done, added: "It is too manifest for argument that the creditor might object to the grant of the homestead and exemption that the applicant had waived his right to take the same in his favor, and such is the ruling of this Court."

VI

Having shown that a creditor can make any objections he may have to the setting apart of an exemption although such objections are not included in Section 2836 of the Code, *supra*, we now proceed to show that a general waiver of the right of exemption in a promissory note will defeat the right of exemption. Prior to the Constitution of 1877 an exemption in property could not be defeated by a waiver by the debtor unless a lien of some kind was created on the property, and he could then waive the right to exemption in that special property. Simmons *vs.* Anderson, 56 Ga., p. 53. But a general wavier of the right of exemption was not good under the Constitution and Statute of 1868. See Stafford, Blalock & Company *vs.* Elliott, 59 Ga., p. 837. But the Constitution of 1877, Article 9, Section 3, Paragraph 1, embraced in Section 5914 of the Code of 1895, does authorize a general waiver of the right to exemption, and is as follows:

"May be waived how far; how sold. The debtor shall have power to waive or renounce in writing his right to the benefit of the exemption provided for in this article, except as to wearing apparel, and not exceeding three hundred dollars' worth of household and kitchen furniture, and provisions, to be selected by himself and his wife, if any, and he shall not, after it is set apart, alienate or encumber the property so exempted, but it may be sold by the debtor and his wife, if any, jointly, with the sanction of the Judge of the Superior Court of the county where the debtor resides or the land is situated, the proceeds to be reinvested upon the same uses."

The Legislature of 1878, acting under the requirement of the Constitution, to provide means of applying for and setting apart the homestead, set out the manner in which a waiver and renunciation of the right of homested might be made effectual, which is embodied in Section 2863 of the Code of 1895, and is as follows:

"Debtor may waive exemption. Any debtor may, except as to wearing apparel and three hundred dollars worth of household and kitchen furniture, and provisions, waive or renounce his right to the benefit of the exemption provided for by the Constitution and laws of this State, by a waiver, either general or specific, in writing, simply stating that he does so waive or renounce such right, which waiver may be stated in the contract of indebtedness, or contemporaneously therewith, or subsequently thereto, in a separate paper."

It will be seen, from a reading of the foregoing constitutional and statutory provisions, that the debtor can waive his right and the right of his family to the benefit of the homestead and exemption on any and all of his property, except the wearing apparel of himself and family and three hundred dollars' worth of household and kitchen furniture and provisions, which waiver may be stated in the contract of indebtedness, or contemporaneously therewith, or subsequently thereto, in separate paper.

Counsel for Lockwood in the argument in the Court below cited *in re* Bass, Federal Case No. 1091, a decision by Mr. Justice Bradley, at Circuit, in which he held that a general waiver of the homestead in a promissory note could not defeat the bankrupt's right to his homestead and exemption. This decision was correct, because the contract in that case was made prior to the Constitution of 1877, and the exemption was set apart prior to that date, and at a time, as hereinbefore stated, when there was no law of the State of Georgia au-

thorizing such a waiver to be made. Judge Bradley decided in that case that the bankrupt court would not take jurisdiction of the exempt property to which the bankrupt was entitled. It must be borne in mind that the reason urged against the exemption was one not authorized by the laws of Georgia. We dare say that if the objection had been made to the grant of the exemption on some ground recognized by the laws of Georgia at that time, the distinguished Justice would have decided the question raised, and if it were true that the bankrupt was not entitled to the exemption, he would have so decided.

We admit that the Trustee does not take title to the exempted property, and that such property is not administered in a court of Bankruptcy, but the question as to what property the bankrupt is entitled to as an exemption must be decided by the bankrupt court, and if it is decided that the bankrupt is not entitled to his homestead and exemption out of any property, or out of any particular property, then that property is necessarily to be administered in the bankrupt court, and is not turned over to the bankrupt, although he may assert a claim of exemption against such property.

In opposition, and, as we think, a successful reply to the decision by Mr. Justice Bradley, above referred to, we cite the decision by Chief Justice Waite *in re* Solomon, Federal Case No. 13,166. That case arose under the Bankrupt Law of 1867, which, as hereinbefore stated, expressly exempts certain property, which is enumerated in the Act, and then provides that such other property as is exempt under the law of the domicile of the bankrupt shall be exempt to the bankrupt. The Act of 1867 provided, just as does the Act of 1898, that the title to the bankrupt's exemption should not pass to the assignee, and that it should not be administered in bankruptcy. Chief Justice Waite, in the quotation from his decision hereinbefore set out, clearly points out that that portion of the bankrupt law of 1867 which provides that the title to the exempted property shall not pass to the trustee, and that the bankrupt court shall not administer such property, refers to cases where the laws of the bankrupt's domicile specify particular articles of property which are exempt, and points out clearly, as will be seen by reference to the quotation from his decision, that as to property not specifically enumerated as exempt under the laws of the bankrupt's domicile, the right of the bankrupt to the exemption is inchoate, and it is for the court to determine whether

under the laws of the State he is entitled to the property under such claim by him as exempt. Surely the bankrupt courts had power under the Act of 1867 to decide such a question, for it is provided in the act that the action of the assignee in setting apart the exemption to the bankrupt shall be "subject to the final decision of said court" —meaning the bankrupt court. It was under this provision of the act of 1867 that Chief Justice Waite considered the objections filed to Solomon's claim of exemption, and decided the question adversely to Solomon. The history of that case is as follows:

The Constitution of Virginia gave to a debtor head of a family an exemption of $2,000, to be selected in the manner to be provided by statute, but provided that the debtor might sell, or he might mortgage or pledge the same.

Solomon executed a promissory note which was subsequently transferred to Gibson & Crilly, containing a waiver of exemption as follows: "I hereby waive the benefit of the homestead exemption as to this debt." The assignee in bankruptcy of Solomon set apart an exemption to him. Whereupon Gibson & Crilly filed their petition in the proper District Court of the United States, attacking the exemption so set apart upon the ground that Solomon, having waived this right in favor of the claim of petitioners, was not entitled to the exemption. The petition sought the relief that is prayed in the petition of creditors in the case at bar. The District Court denied the prayer of the petition, holding that the exemption was properly set apart by the assignee, despite the waiver of exemption by the debtor.

On a review of the action of the District Court by the Circuit Court, Chief Justice Waite presiding, the judgment of the District Court was reversed.

In passing upon the right to waive exemption, the Chief Justice said:

"But it is further provided that nothing in the article of the Constitution referred to should be construed to interfere with the sale of the property, or any portion of it, by virtue of any mortgage, deed of trust, pledge, or other security thereon. Thus it is made expressly to appear that it was not the intention of the framers of the Constitution to prevent the householder from contracting for the sale or incumbrance of the property. He was not required to hold it absolutely for himself and family. It was to remain entirely under his personal control, to be dealt with in such manner as he saw fit. His right to

sell and incumber is as distinctly given as his right to select. If he sells or incumbers before he selects, his power of selection as against such sale or incumberance is gone. No particular form of incumbrance is specified; that is left to the discretion of the Legislature. Now, a waiver of the right to select is, in effect, an incumbrance on the property which might be selected."

In the case of *in re* Solomon, *supra*, the right to sell or incumber the property was reserved to the debtor, and Chief Justice Waite held that a general waiver of the homestead expressed in a promissory note was in effect an incumbrance upon the property, and would defeat the right to the exemption. But the case at bar is much stronger: the question as to the effect of a general waiver in a promissory note, or other paper, is not left for construction. It is expressly provided, both in the Constitution and statute law of Georgia, that the debtor may waive and renounce his right to homestead. Surely, when one renounces his right, he stands as to that transaction as though there had been no law conferring that right upon him. He has parted with the right; he has parted with it for a valuable consideration, and he cannot, therefore, exercise such right.

It is stated by counsel for Lockwood in their brief that *in re* Solomon was referred to on the hearing of *re* Bass as an authority in support of the contention that a bankrupt court would enforce a general waiver of exemption, and that Mr. Chief Justice Bradley paid no heed whatever to that decision. There was no reason why Mr. Chief Justice Bradley should consider the decision *in re* Solomon, *supra*, as controlling in the case of *re* Bass, *supra*, for the simple reason that in the case of *re* Bass there was no law of the State of Georgia which, at the time the contract was made and the exemption applied for, made a general waiver of exemption a valid objection to setting apart such exemption; while in the State of Virginia there was a law which authorized a general waiver of exemption. There is now in Georgia, and was when the contract between the Exchange Bank and Lockwood was made, as this Court will readily see from the quotation from the Constitution and laws of Georgia hereinabove made, provision for making a general waiver of exemption.

The Supreme Court of Georgia has decided repeatedly, indeed, every time the question has arisen in the courts, that the general waiver of the homestead right would defeat the homestead as against

the contract in which, or for the benefit of which, such waiver was made.

See 65th Ga. 672; 69th Ga. 842, third head-note.

These decisions have been followed up to this date. To show the far-reaching effects of the homestead waiver under the Constitution and laws of Georgia, we call attention to the decision in the 65th Ga. 676, in which the Court held:

"Under the Constitution of 1877 and the Act of 1878, a written waiver of exemption and homestead is good *inter se*, without having the same alleged in the declaration or summons, judgment or execution, and is, after judgment, provable *aliunde*, whether the lien of the judgment be general or special, and whether the waiver be written on the contract or obligation or on a separate paper."

The Supreme Court of Georgia has repeatedly held that the effect of a general waiver of the homestead in a promissory note, or other paper, was in the nature of a conveyance by the debtor of his property to the creditor, to the extent of the obligation in favor of which the waiver is made; and the Court has classed a waiver of the homestead right, and right of exemption, with deeds of conveyance.

Section 2892 of the Code of 1895 provides: "All titles to property made as a part of an usurious contract, or to evade the laws against usury, are void."

The Supreme Court of Georgia has repeatedly held that this section of the Code is applicable to a contract in which there is a general waiver of homestead, and if there was usury in the contract, the usury would defeat the homestead waiver.

In the 63d Ga., p. 31, the Court said: "The homestead right is a right in property, and to waive it in favor of a creditor is substantially the same thing as to convey it away—the same, certainly, in respect to putting the debtor in the power of the creditor."

See near top of page 55.

In that case there was a waiver of the homestead in a note which was tainted with usury, and the Court held the waiver to be void.

In the 77th Ga. 343, the Court said: "This waiver waives or vacates the title, the homestead title; it is called by Judge Bleckley, in the 63d Ga., *supra*, a sort of quit-claim title, and the argument there, in that case, is that the waiver is equivalent, substantially, to a title made by the debtor to the creditor, and takes the homestead or ex-

emption from him and his family just as effectually as if he had given a deed or bill of sale to the property."

(See near top of page 399.)

In that case there was a waiver in the note, and the note was tainted with usury, and it was held that the waiver was void.

Prior to the adoption of the Constitution of 1877 a debtor gave his note to his creditor, with a general waiver of homestead therein. At that time such general waiver was not good. After the adoption of the Constitution of 1877, the debtor undertook to assert his homestead right as against such waiver and the case was passed upon by the Supreme Court of Georgia. (69th Ga. 842.)

The Court held that, although the note and waiver antedated the Constitution of 1877, it must be treated as controlled by the Constitution of 1877, and the laws made in pursuance thereof, because the application for exemption was made after the Constitution of 1877 went into operation, and was made under that Constitution.

The Court said: "So that the application and grant of the homestead must have been, and, in fact, are, under that Constitution (Constitution of 1877). By that Constitution, a general waiver is made fatal to the right of homestead under it. We hold, therefore, that if the waiver was made before the adoption of that Constitution, whilst it would not have been good to defeat the homestead under the Constitution of 1868, it will defeat any sought under that of 1877."

(See bottom of p. 845 and top of p. 846, 69th Ga.)

A married lady is not the head of a family in Georgia, and, as such, cannot take a homestead or exemption; and, while a married lady, so laboring under such disabilities, she executed a note in which she waived the right of homestead. Subsequently, she acquired the right to apply for homestead, and the Supreme Court of Georgia, in passing upon the effect of such waiver at a time when she was not capable, as the head of a family, to take a homestead, said:

"A waiver of the homestead and exemption right, even though such right be an inchoate one, is valid, and will be binding on the person making the waiver when the right becomes complete."

101 Ga., p. 283.

The decisions above cited show clearly and conclusively that the Supreme Court of Georgia treats a homestead waiver as a conveyance and as a conveyance of the right of exemption in the debtor to his creditor to the extent of the debt in favor of which the waiver is

made. Without so treating the waiver, the Court could not decide that the waiver would be void when tainted with usury. In addition to this, the rule of law, applied to the last two cases above cited, shows also that the Supreme Court of Georgia treats the general waiver of the homestead right as a conveyance by the debtor to the creditor. It is a well known rule of law, that where one conveys property where he has no title, and he afterwards acquires title, the title which he acquires inures to the benefit of his grantee. So, in the last two cases, it was decided that at the time the debtors executed the waiver contracts they had no homestead right, but that subsequently they became entitled under the Constitution and laws of Georgia to apply for homestead and exemption, and when this right accrued to them, it inured to the creditor who held the waiver note, i. e., their grantees.

We think we have cited authorities sufficient to convince this Court that under the Constitution and laws of Georgia, when the debtor makes a general waiver of the homestead and exemption right in a note, or other paper, he parts with all right to take and hold the homestead or exemption as against such creditor.

We are surprised at the comments made by counsel for plaintiff in this case on the decision in the 74th Ga. 545.

We are unable to understand how learned counsel could have fallen into such an error. There were but two questions before the Court in that case, and they are referred to in the body of the decision as follows: "The plaintiffs in error objected to the allowance of the same (that is, the exemption) among other grounds, because they were the purchasers of the property sought to be set apart under executions issued upon judgments founded on contracts wherein he had waived all right of homestead and exemption." It is further stated by the Court, "This objection was demurred to by the applicant upon the ground that it did not embrace any of the objections allowed by law," the very point learned counsel now makes in his brief. The Supreme Court said further: "The Court sustained the demurrer and disallowed, overruled and dismissed said objection. This ruling is excepted to and constitutes the *only ground of error* relied on here." Thus this Court will see that the question of urging the waiver before the ordinary and before the Superior Court on appeal against the allowance of the exemption was made by the purchasers of the land of Hunt, the applicant, at Sheriff's sale, who claimed to be subrogated

to the right of the judgment creditors of Hunt. The above quotation from the decision of the Supreme Court, in the 74th Ga., *supra*, as to the issues in that case is a sufficient reply to the statement by counsel that the decision was *obiter dicta*.

The case arose in this way: An execution against Hunt was levied on his property. Pending the levy he applied for a homestead exemption. The property was sold and purchased by Tappan Bros. & Co. before the ordinary passed upon the application for exemption, and Tappan Bros. & Co. went before the Court and made their objections, claiming to be subrogated to the rights of the plaintiff in execution.

In order that this Court may understand clearly how this objection could be, and was, made, we call attention to the fact that pending the application for exemption the property may be sold by the sheriff, and the purchaser of the property buys subject to the homestead right. If the homestead right be superior to the judgment under which the property is sold, then the purchaser cannot hold the property as against the homestead right, but if sold under a judgment based upon a debt superior to the homestead right, then the purchaser of the property could hold the title as against the homestead claim.

46th Ga. 293.

40th Ga. 297.

It was decided by the Supreme Court of Georgia that the purchaser of lands, sold as above indicated, was subrogated to all the rights of the plaintiff in judgment, and the purchaser may make any objections to the setting apart of the exemption that the plaintiff in judgment might have made.

43d Ga. 418.

Now in the 74th Ga., *supra*, both of these questions arose, as will be seen by the statement of the Court as to the issues presented for decision. As to the first question, of the purchaser being subrogated to the rights of the plaintiff in *fi. fa.*, the Court said: If the land which the applicant "for homestead seeks to have set apart to himself has been purchased by a person at sheriff's sale by virtue of an execution and judgment against the applicant, which judgment is founded upon a contract made by the applicant with the plaintiff in execution, such purchaser occupies the position of the creditor of the applicant, and he may urge any objections to the grant of the application which the creditor might have done."

As to the second question the Court said: "It is too manifest for argument that the creditor might object to the grant of the homestead and exemption that the plaintiff had waived his right to take the same in his favor."

Learned counsel for the plaintiff in his brief, page 5, says, in reference to the decision in the 74th Ga., *supra*. "Whether the homestead had been set apart or was attempted to be set apart, the creditor had the right to sell, and the purchaser acquired a valid title because the homestead property was subject to the judgment and *fi. fa.*, and he took by his purchase all his creditor's rights." This sentence in the brief occurs to us to be rather misleading. The question under discussion was whether the homestead waiver could be set up as an objection to setting apart the homestead. The Supreme Court of Georgia in the 74th Ga., *supra*, did not put the right of the purchaser to object upon the ground that he had purchased the property under an execution superior to the homestead, but that Court placed it distinctly upon the ground that he had the right, standing in the shoes of the plaintiff in execution, to object to setting apart the exemption because the debtor had waived his right to exemption in favor of the claim which was sued to judgment and under which judgment he bought the property. The question of urging the waiver was necessary to be decided. It was the question and *the only question* at issue in the case. The court will bear in mind that the mere fact that this property was sold under an execution did not vest the purchaser with any right when the sale was made pending an application for homestead, unless the judgment was based upon a contract which outranked the homestead, for unless this is true, such a sale does not divest the debtor and his family of the right to homestead.

See 46th Ga. 293.
40th Ga. 297.

The learned counsel for plaintiff in error in his brief says of the decision in the 74th Ga., *supra*, "If it be not *obiter*, it is 'bench law,' which lacks the force of a statute, and cannot repeal the section of the Code above quoted."

The trouble with the learned counsel is that he does not draw a distinction between objections which the statute provides may be made by any creditor, which go merely to the existence of the family of the applicant in whose behalf the homestead is applied for, and other questions affecting the legality and regularity of the exemp-

tion, as hereinabove enumerated, and objections which defeat the right of homestead. The first class of objections is provided for in Section 2836 of the Code of 1895, *supra*, which must be made by the creditor before the property is set apart, or he cannot thereafter be heard on such questions; while the second class of objections, *i. e.*, those that go to the denial of the right of the exemption as against the debt held by the creditor, may be made either before the Ordinary, while the application is pending, or the creditor may stay out of the Ordinary's Court, and pursue the exemption after it is set apart.

Now in the 74th Ga. 545, it is held that if the debtor wishes to do so he can go in and contest the right of exemption on any ground which defeats the right to the homestead as against his debt or claim. If this is "bench-law," it is quite strange that it has never been questioned or criticized by any decisions of the Supreme Court of Georgia up to this date, but it has been followed in the Courts of Ordinary and in the Superior Courts throughout the State.

The same question was decided in the 44th Ga. 663, above quoted, that is, that the creditor could go in and object, or remain out. The same question was decided in the 47th Ga. 452, where it was held that a creditor who held a purchase-money claim, against which the homestead was not good, was not compelled to go before the Ordinary and make objections to the setting apart of the homestead, for that was not one of the objections which the Statute said must be made before the Ordinary, but inasmuch as he did so, and the decision was against him on his right to subject the property, from which he did not appeal, he was concluded.

A debtor made a conveyance of his lands, and his creditors attacked the conveyance for fraud, and the conveyance was set aside upon this ground. After this was done the debtor applied for a homestead exemption out of the property which he had thus conveyed. The creditor filed a bill, and prayed for an injunction against the Ordinary restraining him from setting apart the homestead exemption on the ground that the debtor had parted with the title; that although the title was not good as against creditors, it was good as between the debtor and the person to whom he conveyed; that the exemption should not be set apart in the land and the creditors should be permitted to proceed to make their money out of the land, because the conveyance had been condemned as fraudulent as to

them. The Supreme Court decided that the conveyance was fraudulent as to creditors, but that the title passed from the debtor to the grantee; that there was no need for an injunction, and on this question the Court said: "It was not necessary that an injunction should issue to restrain the Ordinary from setting apart the homestead applied for. The presumption is that the Ordinary in passing on the application will do so according to law, and in the exercise of the judicial power vested in him would refuse to approve the application, because of the want of a right in the applicant to have property set aside as a homestead for his family, to which he has no title."

We think that these decisions should not be characterized as bench-law. They are constructions of constitutional provisions and statutes of the State of Georgia. Under the Constitution of this State an exemption is not good against the claim for purchase money, for labor done on the homestead, for materials furnished to improve the homestead, for debts contracted in the removal of incumbrances from the homestead, or a debt in favor of which there is a homestead waiver. As to all such claims or debts the Court holds in these decisions hereinabove quoted that one holding a claim of the kind above indicated may go into the Court of Ordinary and make objections, or remain out and pursue the homestead exemption because his claim is superior to it; but as to the statutory objections set out in section 2836 of the Code of 1895, *supra*, the creditor must make his objection before the Ordinary. These decisions do not in any wise affect section 2836 of the Code. They relate to the rights of creditors whose claims outrank the homestead right, while the objections provided for in section 2836 of the Code of 1895, *supra*, must be made before the Ordinary by creditors who do not hold claims which outrank the homestead right. In other words, creditors whose claims do not outrank the homestead right have no choice as to time of making objections, but are compelled to do so before the Ordinary passes upon the claim of exemption; while creditors who hold claims that outrank the homestead right may go before the Ordinary and urge their objections, or may remain away, obtain judgment and pursue the exemption after it is set apart.

VII.

The bankrupt, when he files his petition in voluntary bankruptcy, is required to file also a complete and perfect schedule of his property

of every kind and character, and a perfect schedule of his cre
giving their place of residence, if known, &c.

The bankrupt law requires the bankrupt to file his claim fo
exemption as he may be entitled to.

See Chap. 3, Section 7, Bankrupt Act of 1898.

This, in effect, is an application for exemption.

The trustee is required to set apart the bankrupt's exempt io
report the items and estimate the value thereof to the court.

Chapter 5, Section 7, Subdiv. 11 of the Bankrupt A
1898.

Thus the bankrupt makes his application for exemption
bankrupt court instead of the State court. All his propert
the custody of the bankrupt court, but that which is exemp
cifically is left with him, and that which he may be adjudged
entitled to as an exemption by the court, shall likewise, be turne
to him.

When property is in the custody of the Bankrupt Court, it
uated as though it were in the possession of the Sheriff under a
under the State law; and when property is in the custody of the
ing officer, and there is a waiver of the right of homestead, the
is permitted to make but one selection of an exemption under t
of Georgia.

See Section 2864 of the Code of 1895, which reads as follow

"Debtor may select property not waived. In case of such w
and the levy of an execution by an officer of this State, it shall
right of the debtor and his wife, if he has any, to select and set
as free from levy and sale, three hundred dollars' worth of hou
and kitchen furniture and provisions."

When the report of the Trustee and the objections filed by th
change Bank of Fort Valley were presented to the Court, the
found the property in the situation above indicated, i. e., the pr
brought into the Bankrupt Court through the schedules of Lock
the bankrupt, and the claim made by him of exemption out o
property, and exceptions made thereto by the Exchange Bank o
Valley. Thus the question was presented to the learned Judge
District Court, sitting in bankruptcy, as to what exemption, i
Lockwood, the bankrupt, was entitled to. The Judge decide
as Lockwood had waived his right to exemption in the obli
which was held by the Exchange Bank of Fort Valley, he w

entitled to make any selection of an exemption out of the property, enumerated in his schedules, except that which he could not waive under the Constitution and laws of Georgia, to wit: the wearing apparel of himself and family and three hundred dollars worth of household and kitchen furniture and provisions. In the situation of this property, and under the Constitution and laws of the State of Georgia, the Court could not have made any other decision, for no further or other exemption could be had by Lockwood out of the property. In deciding this case, the Court followed literally the Constitution and laws of Georgia and the practice of the State courts in administering the same.

If the Bankrupt Court is to be governed by the practice of the State Courts in respect to the time of making objections, and as to the kind of objections that can be made to the setting apart of the homestead, then it follows that any creditor can urge in the Bankrupt Court, when the debtor makes application for exemption, his objection to the grant of such exemption, and if his objection is such as is recognized by the Constitution and laws of the domicile of the bankrupt, the Bankrupt Court must recognize and enforce such objection.

While it may be that the Bankrupt Court will not adopt the practice of the courts of Georgia in requiring petition to be filed, service to be made, etc., as is set out in Section 2828 of the Code of 1895, *supra*, yet the Bankrupt Court will follow the practice of the State courts to the extent of permitting any objection to be filed to the bankrupt's exemption if filed within the time required by the Act of Congress, which can be made and urged in the State courts as a reason for defeating the exemption.

In support of our contention on this point, we cite:

In re Solomon, Fed. Case No. 13,166.
In re Wylie, Fed. Case No. 18,112.
Federal Case No. 7,560.
Fed. Case No. 17,562.
Fed. Case No. 10,975.
In re Stevenson, 93d Fed. Rep. 789.
In re Garden, 93d Fed. Rep. 433.
In re Coffman, 93d Fed. Rep. 42.
In re Sisler, 96th Fed. Rep. 402.
96th Fed. Rep. 317.
101st Fed. Rep. 228.

The case in the 96th Fed. Rep., p. 402, arose in the State of ginia, under the Constitution and laws of that State, and dealt the effect of a waiver of homestead. The Court decided that Bankrupt Court was bound to administer the State law and rejec application of the bankrupt to an exemption.

The Court said: "Under the laws of Virginia, a written w of the right to a homestead exemption, contained in a note or evidence of debt, though not a specific lien on the debtor's prop is an incumbrance upon it; and a Court of Bankruptcy has jur tion to enforce, against property set apart to a bankrupt as his h stead exemption under the laws of that State, the right of cred who hold his notes containing such waiver of exemption, though have not reduced their claims to judgment."

2. Same:

"When the bankrupt claims a homestead exemption in pro surrendered, but debts are proved as to which he has waive benefit of the exemption laws, the Trustee must sell the pro claimed as a homestead, or so much thereof as may be necessary pay such debts as have the benefit of the waiver; and the resid the property claimed as homestead, or of the proceeds of sale the will be set apart to the bankrupt."

The decision in the 96th Fed. Rep., p. 317, *supra*, *in re* Woodruff. That case was cited as an authority in su of our contention, that the laws of the State on the su of exemptions to bankrupts should be enforced and ad istered by the Bankrupt Court. That case was carried to the Cou Appeals by a petition to revise the decision of the District Judge nying the bankrupt his exemption. The Court of Appeals rev the decision of the court below, but, as we think, mainly, and might say, exclusively upon two grounds: First, that the credito not except within the twenty days prescribed by the Act of Con to the act of the trustee in setting apart the exemption to the b rupt; second, that the Court enforced the objections of the cre in a bill filed by him for the purpose of asserting his homestead wa and having the property which had been reported by the trust exempt administered in payment of the creditor's claim. We d understand that the Court of Appeals decided in that case that is no remedy for the creditor who holds a waiver note against a b rupt, unless his debt is secured by a lien, or he has prior to the b

ruptcy proceedings sued his claim to judgment, and thereby acquired a lien. And we do not understand that that court has decided that it will not administer the law of the State of Georgia, as it is administered by the courts of that State, when an application is made by a bankrupt for an exemption. These questions, we think, are left undecided by that court.

In re Camp, 91st Fed. Rep., p. 745, will be found a decision by the learned judge of the Northern District of Georgia, in which he decided that a homestead waiver could not be urged against the right of the bankrupt to an exemption in the Bankrupt Court, and we make two comments on that decision, which are perfectly fair to the learned judge, and which will, we think, impair the force and effect of that decision as an authority in this case: First, the question of the effect of a waiver of exemption was not in the case, and the judge so expressly ruled. This being true, the decision must be of small persuasive force. Second, it is due to the learned judge to say that he made his decision upon the idea that no objection could be made to the setting apart of the exemption to the bankrupt in the Bankrupt Court, unless it be such as is stated in section 2836 of the Code of 1895, *supra*, and his attention was not, we are informed, called to the decisions herein referred to, nor was the view, which we present to the Court, that any objection may be made by the creditor before the Ordinary which will defeat the right of the applicant for exemption, argued before him. The learned judge followed the decision in 3d Woods, 382, *in re* Bass, and reported as Federal Case No. 1091, which decision, as hereinabove stated, was made by Mr. Justice Bradley upon a contract which antedated the Constitution of 1877, and on an application for homestead made prior to the Constisution of 1877. In this, we insist that the learned judge lost sight entirely of the change effected in the laws of the State of Georgia by the Constitution of 1877, which provides that a general waiver may be made; and lost sight of the decisions of the courts of Georgia, that when such a waiver is made, it is fatal to the right of the debtor to exemption; and overlooked the decision of the Supreme Court of Georgia that such objections could be made before the Ordinary when the application is made in the State courts for exemption, and therefore could be made in the Bankrupt Court when the application is made by the bankrupt for exemption. We are supported in this criticism of the decision by a decision

recently made by the same learned judge. Had his attention been called to the fact that the application for exemption could be resisted by the creditor who held what is called a homestead waiver note, he certainly would have followed the practice of the courts of the State of Georgia on this question. The learned judge could not have meant that the Bankrupt Court is powerless to do otherwise than turn over what the bankrupt claims to be exempt to him, for he decided the very reverse of that in the 101st Fed. Rep., p. 228. In that case, Waxelbaum, the bankrupt, applied for an exemption. He did not set out a full and perfect schedule of his property, and when the omissions were discovered, did not produce the property. Upon this state of the record, the learned judge decided that Waxelbaum was not entitled to his exemption. He did not in that decision deny the exemption because of any provision of the Bankrupt Act of 1898, but because of a provision in the statute of Georgia, section 2830, of the Code of 1895, *supra*, which provides that the homestead exemption shall be denied to a debtor who fraudulently omits property from his schedule, and who will not restore the same when his fraud is discovered. Thus that learned judge followed the law of Georgia, administered that law, and denied the right of the bankrupt to the exemption. Nothing could be stronger or clearer than is this decision in denial of the contention that the property which the bankrupt may claim as his exemption shall be set apart to him by the Bankrupt Court, and it supports our contention that it can be set apart to him only after the Bankrupt Court decides that, under the laws of the domicile of the bankrupt, he is entitled to the exemption. See also

108 Fed. Rep., p. 599, decision by Circuit.
Court of Appeals for Seventh Circuit.
101 Fed. Rep., p. 196.
106 Fed. Rep., p. 668.
104 Fed. Rep., p. 916.
103 Fed. Rep., p. 854.

The language of Section 70 of the Bankrupt Act of 1898, to the effect that the Trustee shall "be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt," &c., is to be construed *in pari materia* with the other portions of the Act, and not as overturning any of the provisions, or any principle or clear purpose elsewhere expressed therein.

The declared purpose and policy of the Bankruptcy Law is to give to the bankrupt precisely the same exemption which would be allowed him under the laws of the State of his domicile—the same in quantity, in character and in all of its incidents—the same as respects the class of persons entitled to claim it, and the same in respect to the class of debts against which it may be claimed.

The framers of the Bankruptcy Law could not have used words more fit or apt, or made this purpose clearer.

"This Act shall not affect," &c., such exemptions.

Bankruptcy Law, Section 6.

Inasmuch, then, as the Act expressly disavows any purpose to affect the exemption which the bankrupt would be entitled to claim under the State law, Section 70 is not to be so construed as by implication to give the bankrupt a title to an exemption which he has waived, and thereby affect the exemption allowed by the State law to the extent of allowing him exemption of sixteen hundred dollars, where by the law of the State he would only be allowed an exemption of three hundred dollars.

So to construe it would be to overturn the settled law and policy of the State upon the subject of the allowance of exemptions, while the Act declares that it shall not affect the same at all.

Again, the Bankrupt Law not only provides that the bankrupt's exemption shall be set apart by officers of the Court of Bankruptcy, thereby making this a matter within the general jurisdiction of the court over bankruptcy proceedings, but it is expressly enacted (Section 2, subdiv. 11) that the Courts of Bankruptcy shall "determine all claims of bankrupts to their exemptions." The grant of jurisdiction thus clearly conferred is not to be taken away by inferences sought to be drawn from the language in Section 70, to the effect that the trustee shall take the title to the bankrupt's property by operation of the law, and administer it as assets for the payment of debts except in so far as it is property which is exempt."

We submit that, by no fair or natural construction or implication, can anything be drawn from the language of Section 70 which in any way conflict with Section 2, or with other portions of the Act.

It means, we submit, no more than that the trustee is not to administer property of the bankrupt in so far as it is exempt, and that no title passes to the trustee in so far as it is property which is exempt from the payment of debts, and therefore exempt from being admin-

istered. In so far as it is property which is exempt, there is neither reason nor necessity for the trustee to administer it, and there is therefore no reason or necessity that the law should invest him with title to it.

But the question, at last, is what is meant by the words "property which is exempt," as used in Section 70 of the Bankrupt Law of 1898? It means, of course, any property that is specifically enumerated in the laws of the bankrupt's domicile as exempt.

See *in re* Solomon, Fed. Case 13,166.

There is no property in the State of Georgia absolutely exempt, except the wearing apparel of the debtor and his family and three hundred dollars' worth of household and kitchen furniture and provisions. As to all other claims to exemptions, that right must depend entirely upon the laws of the State and the practice of the courts of the bankrupt's domicile, and the decision of the Bankrupt Court enforcing the law of the domicile of the bankrupt, following the decisions of the courts thereof.

If the contention of the plaintiff in error in this case is correct, *i. e.*, that whatever the bankrupt may claim is exempt, and the Trustee may set it apart to him, provided it does not exceed in amount the sum of sixteen hundred dollars, then there is nothing whatever for the Bankrupt Court to decide. A figure-head would be made of the Court, and the right of the bankrupt to his exemption would be controlled absolutely by his application and the action of the Trustee. Such a construction of the statute would render useless and unmeaning Subdivision 11, Section 2, of the Bankrupt Act, which provides that Courts of Bankruptcy shall "determine all claims of bankrupts to their exemptions." We contend that the Bankrupt Court must of necessity pass upon and decide all questions that arise, both for and against the right of the bankrupt to an exemption; for language much less explicit, as to the power of the Bankrupt Court in this regard, was construed by Chief Justice Waite to confer power upon the Bankrupt Court to deny the right of the bankrupt to exemption.

See *in re* Solomon, Fed. Case 13,166, *supra*.

VIII

Under the law of Georgia, a homestead and exemption after it has been set apart by the Ordinary, cannot be sold except in the manner provided in Section 2850 of the Code of 1895, which is as follows:

"Homestead, how and when sold by officer. In all cases when any defendant in execution has applied for and had set apart a homestead of realty and personalty, or either, or where the same has been applied for and set apart out of his property, as provided for by the Constitution and laws of this State and the plaintiff in execution is seeking to proceed with the same, and there is no property except the homestead on which to levy, upon the ground that his debt falls within some one of the classes for which the homestead is bound under the Constitution, it shall and may be lawful for such plaintiff, his agent or attorney, to make affidavit before any officer authorized to administer oaths, that, to the best of his knowledge and belief, the debt upon which such execution is founded is one from which the homestead is not exempt, and it shall be the duty of the officer in whose hand the execution and the affidavit are placed to proceed at once to levy and sell, as though the property had never been set apart. The defendent in such execution may, if he desires to do so, deny the truth of the plaintiff's affidavit, by filing with the levying officer a counter affidavit."

After the homestead is set apart it may be sold under an execution founded on a debt against which the homestead and exemption is not good, that is to say; a debt for taxes due the State, County and Municipality, a debt for the purchase money of the property set apart, a debt for labor done thereon, a debt for material furnished therefor, a debt for the removal of incumbrances thereon, or a debt in favor of which there is a waiver of homestead.

This Court is herein fully advised, that under the laws of Georgia and the practice of the courts in regard to homestead and exemption applications, one holding a contract with a general waiver of homestead can enforce his contract in two ways: first, he may go into the Court of Ordinary, when the debtor makes his application for exemption, and defeat the same; second, he may refrain from making objections, and permit the homestead and exemption to be set aside, and then obtain a judgment on his demand and levy on the homestead, as is provided in Section 2850 of the Code of 1895, *supra*.

If a creditor has obtained a judgment on a contract in favor of which the waiver of homestead has been made, and his debtor should be declared a bankrupt, he can go into the Bankrupt Court, and prove his debt, and object to the setting apart of a homestead to the bankrupt, or he can keep out of the Bankrupt Court, refuse to prove

his claim and levy upon the property, although it may have been set apart as a homestead to the bankrupt, for in such case his lien would not be affected. But where a creditor of a bankrupt has no lien, either made by contract or a judgment lien, but has simply a contract debt, in favor of which the bankrupt has waved his right to homestead and exemption, then there is left to him but one method of contesting the bankrupt's right to homestead and exemption, and that is to go into the Bankrupt Court, make his objections within the time prescribed by the Act of Congress, and have the court to pass upon the same.

But even if a creditor, holding a contract in favor of which there is a waiver of homestead, could not go into the State Court and defeat the application of his debtor for homestead, but would be required to obtain a judgment and levy on the exempted property, the bankrupt court should entertain such objection, because, if not entertained, the creditor's constitutional right to rely upon the homestead waiver would be defeated, if the creditor did not have a judgment or other lien at the time his debtor is adjudged a bankrupt. For, if the creditor has no lien, his debt would be discharged by the discharge of the bankrupt, and he could not thereafter sue upon his demand and reduce it to judgment and reach the exempted property of the bankrupt.

The evident meaning and purpose of the bankrupt act is to require the bankrupt court to decide all questions affecting the right of the bankrupt to exemption before he is discharged in bankruptcy. Necessarily, then, any objection that would be good in the State courts, either in resistance to the application to have the exemption set apart, or in enforcement of the right against the exemption after it is set apart, should, and must be, determined by the bankrupt court when the application of the bankrupt for an exemption is made. There is but one possible hearing that can be had in the bankrupt court, and that is at the time the application for exemption is made, and before the judge finally passes thereon.

If any other construction is given to the bankrupt act, or if it is otherwise administered, then the valuable contract right of the creditor of a waiver of exemption by his debtor, under the Constitution and laws of Georgia would be utterly destroyed. The bankrupt act declares that these rights shall not be interfered with, but shall be administered in the bankrupt court.

The Exchange Bank of Fort Valley has no lien on Lockwood's property. It has a general homestead waiver. If Lockwood shall be given his exemption as against the Exchange Bank of Fort Valley, and should be discharged, the debt would be discharged and the bank could not sue the note to judgment and levy upon the exemption. This being true, the objection by the Exchange Bank of Fort Valley had to be made in the District Court to the setting apart of the exemption, or its homestead waiver right would be destroyed. Under the Constitution and laws of Georgia as construed by the Supreme Court in the numerous cases above cited, the Exchange Bank of Fort Valley, holding a homestead waiver note, would have two remedies in the State Court were the application for exemption pending in said Court: (1) It could go before the Court and urge the objection to the exemption that it held a waiver of the homestead, executed by Lockwood (see decisions above). (2) Or it could remain out of the Ordinary's Court, sue the claim to judgment and levy on the exemption after it is set apart by filing an affidavit that the exemption was not superior to the debt due to it. But as the application for exemption is in the Bankrupt Court, and as the Exchange Bank of Fort Valley has not a judgment or other lien, and, inasmuch as the discharge of Lockwood would prevent it from suing and obtaining judgment on its debt, and levying on the exemption, there is but one remedy left to the Exchange Bank of Fort Valley in this case, and that is to urge its objection in the District Court, which has been done.

The learned counsel for plaintiff in this case says in their brief: "It may be that the State Court could on a proper proceeding give relief to the creditor holding a waiver of homestead in a proceeding *in rem*. We are not called on to furnish a remedy." It occurs to us that if learned counsel could point out the proper proceeding which would give relief to a creditor by a proceeding *in rem* he should do so, that this court might understand that the decision which he invokes would not entirely destroy the constitutional right of a waiver to the creditor. He declines, however, in his brief, to point out that remedy, or even suggest it, and denies that it is incumbent upon him to do so. Now we have not requested him to point out the remedy for us. The Constitution and laws of Georgia, as construed by the Supreme Court of Georgia, point out that remedy clearly and unmistakably, and we feel satisfied that this Court will be convinced on reading these constitu-

tional and statutory provisions, and the decisions by the Supreme Court of Georgia, that the right of the Exchange Bank of Fort Valley to make this objection is beyond question, and that the decision of the District Judge sitting in Bankruptcy in this case is correct.

IX.

One question arose during the oral argument of this case in the court below as to how the court could administer the bankrupt law by denying Lockwood's claim to an exemption as against the debt held by the Exchange Bank of Fort Valley, and yet protect Lockwood against other creditors. It seems to us that under the practice in the State Courts of Georgia, and under the practice of some of the courts of bankruptcy, there can be no difficulty in administering the bankrupt law in this respect.

It has been repeatedly held by the Supreme Court of Georgia that where a debtor had several creditors, he may take an exemption against some of his creditors, while the exemption would not be good as to others. We cite one case which, we think, is sufficient on this subject (see 63 Georgia, page 296), where it is held that an exemption might be good against a senior judgment and not against a junior judgment, for the reason that the junior judgment creditor held a claim which was better than the exemption right of the debtor, while the senior judgment creditor did not have such right. In that case it is held that the exemption was subject to the junior judgment, but not subject to the senior judgment. The debtor, in that case, could pay off the junior judgment and retain his exemption, or suffer a sufficiency of it sold to pay off the junior judgment, and enjoy the exemption as against the senior judgment.

In other words, the fact that a creditor urges an objection which will defeat the right of the bankrupt to an exemption as against his claim, will not subject the property of the debtor to claims of other creditors, whose claims are not superior to the exemption right of the debtor.

In the case at bar, Lockwood's property, which was set apart to him by the trustee, cannot be made subject to any other debt in the event we succeed in enforcing our debt against the property claimed as an exemption. The trustee would be required to sell the property and

pay off the claim of the Exchange Bank of Fort Valley and the remainder of the property would be held by Lockwood as an exemption, or Lockwood might pay off and discharge the claim of the Exchange Bank of Fort Valley and hold all of the property as an exemption. See 93 Georgia, page 612, for a case in which it is held that the debtor could not take an exemption as against an exemption waiver note, except to the extent of the property or money left after paying off such note, and paying expenses of bringing the fund into Court, etc.

We beg the Court to bear in mind that in order to make an objection to an exemption, it is not necessary that a note should be sued to judgment, for we have cited several instances in which a creditor who held no judgment might go into the Court of Ordinary and defeat an exemption as against that debt. We do not mean to be understood as contending that such creditor could defeat an exemption entirely, but merely defeat it to the extent of such creditor's claim.

Upon this point, and showing how easy a matter it is to administer the bankrupt law as we contend it should be, we call attention to 96 Federal Reporter, page 402, *supra*.

We close this brief by quoting the decision of the Honorable Emory Speer, United States District Judge, in this case, which, we think, will throw much light on the questions certified by the Circuit Court of Appeals to this Honorable Court, which is as follows:

"This is a question of tremendous importance to the people of the State of Georgia and to all others having commercial relations with them.

"Chapter 2, Section 2, of the Bankruptcy Act of 1898, provides that the 'Courts of Bankruptcy . . . are hereby invested . . . with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy to determine . . . all claims of bankrupts to their exemptions.' This Court was of the impression, as expressed by its ruling *in re* Woodruff, that where there was a waiver of the homestead exemption which is provided for by the Constitution of the State, that it could be enforced in the Bankrupt Court upon a proceeding equitable in its nature to which the creditor and the bankrupt were parties. It seems that we were in error in that conclusion, and the decision has been reversed by the Circuit Court of Appeals for the Fifth Circuit, and to the finding of that distinguished and controlling tribunal we cheerfully bow.

"The question now is presented in a different manner. It is not now obnoxious to the attack that it is a proceeding in equity. The objection to the allowance of the exemption is now made by the creditors by exceptions filed within twenty days after the exemption was granted as directed by the Bankrupt Law, and it is made in the manner by which the law of the State permits a creditor in whose favor a waiver of exemption has been made to resist the granting of the homestead. The issue is thus clearly presented. Since a proceeding under the equitable powers of the Bankrupt Court to determine claims of bankrupts to their exemptions in behalf of the creditor may not be maintained, if a proceeding at law in technical compliance with the statute is not justifiable, then it is finally evident that a homestead waiver in Georgia where the debt has not been sued to judgment, amounts to nothing. The creditor holding that solemn obligation which is deemed so important that it is immovably anchored in the Constitution of the State, a provision which is the basic principle of the policy of our State, which involves innumerable contracts intended to be secured but for which no other security was exacted save the faith of the creditor in the validity of that provision of the Constitution and by virtue of which alone men of slender means throughout the State are enabled to secure credit to carry on their farming and other operations, is defeated by a proceeding in bankruptcy. Now, the Bankrupt Act itself provides, in that clause which is the foundation for all exemptions, Section 6, clause A, 'This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition.'

"Is the remedy to which the creditor holding this security now has recourse appropriate? Ought not its propriety to be settled by the law of the State? This would seem clearly justified by the established practice of the United States Courts in analogous cases. What, then, is the State law on this subject? It is not obligatory upon the creditor holding a waiver note to resist the application on that ground, but he is permitted so to do. This we find announced in the Supreme Court of the State of Georgia in Tappan Bros. & Co. *vs.* Hunt, 74 Ga. 546, 'It is too manifest for argument,' says the Court, 'that a

creditor might object to the granting of a homestead exemption that the applicant had waived his right to take the same in his favor. Such is the ruling of this court in 43 Ga. 418.' See also Code, Par. 2010. There is a foot-note to this decision which indicates that it is distinguishable from the decisions of the Federal courts to which counsel for the bankrupt alluded in his argument, in that the application for homestead like that in the case at bar was under the Constitution of 1877. It is this Constitution which defines and makes effective the waiver of exemptions. Since then we have the warrant of the Supreme Court of the State for the method in which this objection can be made, ought not this Court to adopt it? It seems that we are bound so to do. Nor does it appear that this conclusion is inimical to the holding of the Circuit Court of Appeals in the Woodruff case. There the first ground of exception to the ruling of this Court was that the objecting creditors had not filed their objections within the twenty days provided by the rules of the Supreme Court in Bankruptcy, and that ground was also alluded to by the Court in its opinion. Here that objection is avoided. The exceptions were filed within twenty days. There the decision was put upon the ground it was a plenary proceeding in equity which the Court had no right to adopt. Here there is no such proceeding. The questions are therefore presented in a manner differing *toto celo*, and the Court feels at liberty by its rulings here to protect the honest demand of these creditors, and the integrity of business transactions in this State so far as they were intended to be conserved by the Constitution of the State of Georgia.

"We therefore overrule the demurrer to the objections and direct that they should be sustained. The decree will be entered accordingly."

XI.

We respectfully submit that the Circuit Court of Appeals for the Fifth Circuit should be advised by this Court, first, that under the Constitution and laws of Georgia a bankrupt has no right to exemption such as that claimed by Lockwood until the same is set apart to him either in the State Court or by the bankrupt court, which must follow the laws of the State on this subject; and second, that there is no exemption to a bankrupt under the Constitution and laws of

Georgia until the same is set apart to him; and, under t
Georgia, a general waiver of the right of exemption in a p
note will defeat the exemption as to such debt if objection
emption on such ground is seasonably made in the Bankrupt

Respectfully submitted,

OLIN J. WIMBERLY (with whom JOHN
on the brief) for the Exchange Ban
Valley and F. T. RAPE, Trustee.

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OHN I. HALL
Bank of Ft.